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Editorial

IT'S 2002: DO YOU KNOW YOUR IOLTA INTEREST RATE?

The Supreme Court has historically provided mandates for the deposit of client funds into attorney trust accounts. Before 1980, federal law prohibited interest to be generated on checking accounts maintained by federally insured banks. Therefore, client funds were deposited into interest-free attorney trust accounts. The banks received a windfall: short-term, interest-free "loans" for their use.

In 1980, banking laws changed. For the first time banks could offer interest on checking accounts or NOW accounts. However, attorneys could rarely take advantage of these interest-bearing accounts for their clients. The purpose of depositing funds into an attorney's trust account was either for short-term deposits with immediate access to the funds, or for small amounts whose interest would not exceed the costs attendant to separate accounting. Therefore, individualized interest-bearing trust checking accounts were unwieldy and impractical. Clients could rarely, if ever, earn a positive net interest. In 1988, New Jersey joined the ranks of those states that adopted the Interest on Lawyers' Trust Accounts (IOLTA) Fund as a method of collecting and using the interest that would be earned on these deposits. Rule 1:28A. All 50 states now have similar IOLTA programs.

Pursuant to our court rules, participation in the IOLTA program is mandatory. The type of funds to be deposited is strictly circumscribed, and the use to which that combined interest can be assigned, carefully delineated. As a result, what might have amounted to a pittance for a client, in conglomerate became a substantial fund.

According to information routinely gathered and analyzed by our IOLTA fund, in the year 2000, the average balance of all IOLTA attorney trust accounts in New Jersey alone on any given day, at any given time was \$1.2 billion. By the end of the third quarter, Sept. 30, 2001 (the last date for which this data is available), that amount had increased to an average daily balance of \$1.5 billion in roughly 120 participating New Jersey banks. That is \$1.5 billion that these banks can use to fund their mortgages, home equity loans, automobile loans, and other types of loans for which they receive approximately 7 percent or more on interest they charge.

Have you checked the interest rate your bank pays on your IOLTA account? The rates

vary greatly from 0.25 percent to 2.75 percent, depending on the bank you choose. Although this rate variation may seem minimal, if all the banks paid IOLTA interest at only 0.25 percent, the annual earnings on \$1.5 billion would be only \$3,750,000. If every IOLTA account paid 2.75 percent (a rate that even IOLTA concedes is wishful thinking), the earnings would be 11 times greater, or \$41,250,000.

While many banks continued to pay the same rates in 2001 that they paid in 2000, others reduced the rates they pay. In fact, the average IOLTA interest rate paid in 2000 by all of the participating banks was 1.6 percent. Unfortunately, the average interest rate paid through the third quarter of 2001 dropped to 1.4 percent.

A comparison of two of the major participating banks demonstrates the disparity in their approaches to IOLTA. One bank dropped its interest rate in November 2001 to 1 percent. The other bank pays the fund interest based upon tiered account levels, more typical of a large commercial account. As the balance in the account goes up, the interest rate goes up as well, to a high-water mark of 1.98 percent for accounts with balances of \$250,000 or more. While a third major bank advertised its November money market account rates to be between 1.73 percent for accounts with \$5,000 and 2.47 percent for accounts with \$50,000 or more, that bank pays IOLTA a flat 1.1 percent. Even its advertised passbook savings accounts earned 1.49 percent.

Meanwhile, some of the banks that have reduced interest rates to IOLTA also charge higher activity fees to IOLTA. A few banks charge fees as high as 23 percent of the gross interest earned. On average, the IOLTA fund repays 5 percent of all its earnings to those banks that charge for these accounts. These fees generally include monthly account fees and per check and per deposit charges on each transaction. Yet, only half of the IOLTA participating banks actually charge the fund these fees. Half of the banks charge no fees whatsoever, simply satisfied to have these accounts as a significant growing source of inexpensive money to use almost interest-free.

In 2000, IOLTA collected \$16.3 million to fund its very narrowly construed mission. As designated by the Supreme Court, the fund uses the money to provide legal aid to the poor, and education and beneficial services to the public. Legal Services of New Jersey receives 75 percent of the funds. The New Jersey State Bar Foundation receives 12.5 percent for educational lay programs relating to law and justice, and other public service programs such as the High School Mock Trial Competition and numerous publications. The balance of the funds is granted to small entities that provide legal services and assistance to the indigent. R.1:28A-4. For instance, IOLTA grants money to several Court Appointed Special Advocate Programs (CASA) for children in Essex, Morris-Sussex, Mercer and Atlantic-Cape May. The CASA program is a volunteer organization of people who assist and advocate for the rights of individual children in foster care. IOLTA grants go to the Covenant House Youth Advocacy Program, the advocate of legal rights of homeless youths who, having reached the age of 18, are no longer eligible to be in foster care. In 2002, \$2.1 million in IOLTA grants will support these and numerous other crucial programs that offer priceless services to the poor.

The \$16.3 million raised for IOLTA is not enough. Legal Services which provides civil legal services to the poor, the disabled, and the most vulnerable citizens of the state, can only represent, at best, 25 percent of the people who are in need of assistance and who meet the requirements for representation. In a "legal triage," they must select those most in immediate need. The rest of their applicants must wait, or give up.

Even the amount of the fund is not guaranteed. In the pending difficult economic times, when the rush to refinance has passed, will these accounts maintain their \$1.5 billion average daily balance? If interest rates continue to decline, or the daily balances decrease, the IOLTA fund will be curtailed. With less funding for Legal Services, what will happen to those so much in need? What will happen to the pro bono requirements already imposed upon attorneys in New Jersey?

What can we, as members of the bar who control these accounts, do to protect the IOLTA fund? The easy answer is: "Ask." Ask your bank what interest rate it pays to IOLTA. Ask your bank what fees it charges to IOLTA. Comparison shop. Understand the spread between what your bank pays the IOLTA fund and what it charges your clients. Yet, we only can control our own accounts.

Better yet, we call upon the New Jersey State Bar Association, and each county bar association, to lend a voice to IOLTA. The bar associations could consult with the IOLTA directors, and then contact banks to determine which ones are providing the best returns with the lowest costs to IOLTA. The promise of more business, or the loss thereof, would have far more impact coming from an association than any single law firm.

Attorneys hold the purse strings. Why not turn them into reins? We can, with little effort, steer our attorney trust accounts to those banks that are willing to pay just a little more for the privilege of receiving our trust deposits.